United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7119

To be argued by
JACOB OLINER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7119

JACK SOBEL, as the sole surviving General Partner of Great River Country Club Associates,

Plaintiff-Appellant,

-against-

HONORABLE DAVID L. GLICKMAN, a Justice of the Supreme Court of the State of New York, Tenth District,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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PLAINTIFF APPELLANT'S BRIEF

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April 12, 1976

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PLAINTIFF APPELLANT'S BRIEF

STATEMENT OF THE ISSUES PRESENTED

Is the plaintiff-appellant deprived of due process in the meaning of The Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by the courts of the State of New York, by reason of the fact that the statutes and the court practice of the State of New York fail to provide a procedure for the removal of a trial judge on the ground of personal bias, prejudice and hostility, and that the only remedy is by way of appeal from the judgment of such partial judge?

STATEMENT OF THE CASE

The plaintiff-appellant is the sole surviving general partner of Great River Country Club Associates, a limited partnership, which owned a lease and purchase contract pertaining to country club property in Great River, New York, consisting of approximately 230 acres of land, a clubhouse, a golf course and related facilities. Great River Country Club Associates was formed in 1960, and is a limited partnership which originally consisted of three general partners of which the plaintiff-appellant is the sole surviving general partner, and approximately 110 limited partners who invested money through a public syndication offering.

John Bess was the underwriter in the public offering, and it was through his efforts that an original capital of $300,000 was raised by way of limited partnership contributions.

In 1961, a limited partner brought on an arbitration proceeding in the City of New York seeking the removal of plaintiff-appellant as a general partner and the liquidation of the partnership and sale of its assets. The arbitration proceeding was settled by the terms of which John Bess was appointed trustee and receiver to sell and wind up the

partnership assets, unless the plaintiff-appellant herein sold the partnership property on or before December 15, 1961. Plaintiff-appellant having been unable to effect a sale on or before such date, John Bess entered upon his duties as trustee and receiver and took possession of the country club property in Great River, New York. He then caused the purchase contract of the limited partnership to be assigned to Timber Point Country Club, Inc., a corporation which was controlled by him, but the control of which he originally denied, and the said corporation took title to the country club in September 1963. The plaintiff-appellant, as the sole surviving general partner, then commenced an action in the Supreme Court of the State of New York, Suffolk County, to retrieve the real property conveyed to the corporation into the receivership, and that action was settled in January of 1966 by a stipulation upon which an interlocutory judgment was entered. The gist of the settlement was that title to the real property was left in Timber Point Country Club, Inc. (the corporation controlled by John Bess), but Bess was directed to cause the transfer of the common stock of the corporation to himself as trustee and receiver of the limited partnership. The interlocutory judgment also directed John Bess to file an accounting as trustee and receiver.

On January 31, 1970, the plaintiff-appellant herein, on behalf of himself, as limited and general partner, and all other limited partners similarly situated, brought on an application in the Supreme Court, New York County (the court which confirmed the appointment of John Bess as trustee and receiver), for a declaration of the rights and duties of John Bess as such trustee and receiver of the limited partnership, and for a distribution of the common stock in Timber Point Country Club, Inc. to the beneficial owners in the proportion of their respective interests in the limited partnership. That petition was dismissed by the Supreme Court, New York County, but on appeal the judgment of dismissal was unanimously reversed. However, the New York County proceeding was stayed by the Appellate Division of the Supreme Court of the State of New York, First Department, pending the accounting in the "Suffolk County receivership", and the Court expressed the opinion that the relief sought in the New York County proceeding "could eventuate" in the Suffolk County accounting. Several further accountings by John Bess were directed to be filed in the Suffolk County action, and an unbelievable amount of motions and appeals were required to finally force John Bess to account for the common stock in Timber Point Country Club, Inc. as an asset of the receivership.

John Bess, the trustee and receiver, steadfastly contended in all his accounts in the Suffolk County action, that he personally was the owner of the common stock in Timber Point Country Club, Inc. and he was on several occasions supported in his contentions by Mr. Justice David L. Glickman, sitting in the Supreme Court, State of New York, Suffolk County, before whom hearings on various aspects of the accounting were held. Both a partial judgment of Mr. Justice Glickman and an Interim Order and Decree by him, adjudicated the common stock of Timber Point not to be assets of the receivership, and both were reversed by the Appellate Division of the Supreme Court of the State of New York, Second Department. The case was remanded for a new trial. The last Order of Reversal of the Appellate Division, dated July 7, 1975, directed John Bess to account for the common stock as an asset of the receivership, and shortly thereafter, the plaintiff-appellant herein moved in Special Term of the Supreme Court, Suffolk County, for leave to join the limited partners listed by John Bess in his "accounting of the common stock" as parties to the accounting. That motion was referred by Special Term to Mr. Justice Glickman, who promptly denied the motion and sua sponte scheduled the trial on the accountings for October 14, 1975.

While plaintiff-appellant's appeal from an Interim Order and Decree (the last judgment of Mr. Justice Glickman appealed from) was pending, the attorney for plaintiff-appellant filed a complaint against Mr. Justice Glickman with the Temporary New York State Commission for Judicial Conduct, of which Mr. Justice Glickman was apprised. When the case was called for trial before Mr. Justice Glickman on October 14, 1975, plaintiff-appellant's attorney moved that Mr. Justice Glickman disqualify himself on the ground of personal bias, prejudice and hostility toward plaintiff-appellant's attorney. Mr. Justice Glickman denied the motion, but granted an adjournment of the trial to November 10, 1975 so as to afford plaintiff-appellant's attorney an opportunity to examine certain books and records of the defendants in that action in preparation of the trial. The hearing commenced on November 10, 1975 before Mr. Justice Glickman, and continued on November 12th and 13th and was then adjourned to November 24, 1975. Plaintiff-appellant's attorney, who suffers from a heart condition, made an application on medical grounds to adjourn the trial for four weeks, but upon the hearing for the adjournment, Mr. Justice Glickman demonstrated hostility towards the said attorney and stated from the bench that if an application for a stay of trial be made to any court, that

he would personally intervene in opposition thereto. Mr. Justice Glickman then adjourned the trial to January 19, 1976 peremptorily against the plaintiff.

An application by plaintiff-appellant for leave to proceed as a poor person in the State Court action was denied by Mr. Justice Glickman by an order dated November 26 , 1975, although it was demonstrated that plaintiff-appellant had no funds whatsoever, lives on a small social security disability pension, and is substantially supported by his wife who is gainfully employed as a school teacher.

During the trial, on the three days in November 1975, Mr. Justice Glickman demonstrated distinct favor for the defendants, and on many occasions, he raised objections to plaintiff-appellant's attorney's questions on cross-examination of the defendant sua sponte and assumed an advocatory attitude in favor of the said defendants. The plaintiff-appellant thereupon commenced an Article 78 proceeding in the nature of a Writ of Prohibition in the Appellate Division of the State of New York, Second Department, for a judgment removing Mr. Justice Glickman from hearing the case on the ground of his personal bias, prejudice and hostility towards plaintiff-appellant's attorney and other grounds. Mr. Justice Glickman appeared in the Article 78 proceeding by the Attorney

General of the State of New York. No answer was interposed to the petition, and the opposition by Mr. Justice Glickman to the Article 78 petition consisted of an affidavit of an Assistant Attorney General of the State of New York, who had no knowledge of the facts. Substantially, the allegations of the petition remain uncontradicted by the respondent.

The Appellate Division of the Supreme Court of the State of New York, Second Department, dismissed the Article 78 petition by an order dated January 16, 1976, reading as follows: "Proceeding dismissed on the merits, without costs. An Article 78 proceeding does not lie to remove a judge from hearing a case on the grounds presented". It thus appears that upon the facts as presented in the Article 78 petition (which, for the purpose of this action must be assumed to be true), the decisional law of the State of New York does not provide a remedy to remove a biased judge from presiding at the trial of the case. An application for leave to appeal to the Court of Appeals was denied by the Appellate Division, Second Department, on March 3rd, 1976 , but plaintiff-appellant filed, nonetheless, a Notice of Appeal to the Court of Appeals on constitutional grounds, contending that the dismissal of the Article 78 petition involved a question of due process both under the New York State and the United States of America constitutions.

Plaintiff-appellant then sought in the Court of Appeals a temporary stay of the trial before Mr. Justice Glickman pending the hearing and determination of the appeal to the Court of Appeals, and attempted to present an order to show cause to Chief Judge Breitel of said Court, who refused to sign the same, and expressed the opinion to the attorney for plaintiff-appellant that the courts of the State of New York would not permit the removal of a biased judge by a collateral proceeding; that the remedy in such case is by way of appeal from the judgment of the Trial Court, and that the Court could not be concerned with plaintiff-appellant's inability to defray the costs of such appeal. Thereupon, plaintiff-appellant commenced this action in the Federal Court on the ground that the federal standards of due process as guaranteed by the Federal Constitution were violated by the courts of the State of New York and sought, in the District Court for the Eastern District of New York, a temporary stay of the trial in the state court action before Mr. Justice Glickman. The plaintiff-appellant presented an order to show cause to the District Court (Weinstein, U.S.D.J.), and an informal hearing was held on March 5, 1976 before Judge Weinstein with regard to such application for a temporary stay at which defendant-appellant was represented by an Assistant Attorney General

of the State of New York. The District Court declined to grant the stay or to sign the Order to Show Cause presented to him, and on his own motion, dismissed the complaint. The District Court accepted the statement of plaintiff-appellant's attorney that plaintiff-appellant had no funds to perfect an appeal, and thereupon granted to him the right to proceed in forma pauperis.

Despite these adversary proceedings between plaintiff-appellant and Mr. Justice Glickman, the trial was resumed before him on March 8, 1976 and continued through March 10, 1976, and at the end of that day, plaintiff-appellant's attorney asked for a continuance of the trial to the 16th of March, 1976, by reason of his physical exhaustion. Mr. Justice Glickman refused to grant such short adjournment, and directed the attorney for plaintiff-appellant to appear the next day at 11:00 o'clock in the morning in the outlying County of Suffolk. Plaintiff-appellant's attorney had another counsel fill in for him, who, in his own wisdom rested plaintiff's case that morning, although a wealth of accounting figures were still available to plaintiff-appellant's attorney of record to be placed into evidence in the state action. The matter is presently sub judice and no decision has been rendered by Mr. Justice Glickman at the time of the presentation of this brief.

THE PLEADINGS IN THIS ACTION

The complaint in this action invokes the jurisdiction of the federal courts under 28 U.S.C., Sections 1331 and 1343 and 28 U.S.C., Section 1983 to redress the violation of the rights and privileges of the plaintiff-appellant to a fair trial secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The complaint alleges that the defendant-appellee, a Justice of the Supreme Court of the State of New York, Suffolk County, presided, and intends to preside, at the trial involving the plaintiff-appellant, that the defendant-appellee refused to disqualify himself on a motion made before him on the grounds of personal bias and prejudice against the plaintiff-appellant, and hostility towards his counsel, that the plaintiff-appellant has no means to finance an appeal from the determination of the defendant-appellee in the state court action, and is unable to pay the costs of the transcript of the trial, that plaintiff-appellant moved before the defendant-appellee for leave to proceed as a poor person in the state court action, which motion was denied by the defendant-appellee, that the plaintiff-appellant brought a proceeding in the Appellate Division of the Supreme Court of the State of New York, Second Department, in the nature of Writ of Prohibition

to remove the defendant-appellee from presiding at the trial in the state court action, that the said Writ of Prohibition was dismissed on the merits, that the Appellate Division, Second Department, denied leave to appeal from its dismissal, that a Notice of Appeal to the Court of Appeals of the State of New York was, nonetheless, filed, that plaintiff-appellant sought a temporary stay of the trial pending determination of his appeal to the Court of Appeals, and that such temporary stay was not granted by the Chief Judge of the Court of Appeals of the State of New York.

The complaint further alleges that the plaintiff-appellant would be irreparably harmed by reason of defendant-appellee's bias and hostility towards the plaintiff-appellant, and that he would be deprived of a fair hearing and of due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution.

There was annexed to the complaint and made part thereof, the Notice of Petition, the Petition in the nature of a Writ of Prohibition, and the affidavit of Jacob Oliner, Esq., sworn to December 11, 1975, stating the factual background as grounds for the removal of the defendant-appellee from presiding at the trial in the state court action, all of which are part of the pleadings.

THE LAW OF THE STATE OF NEW YORK PERTAINING TO THE REMOVAL OF A JUDGE FOR BIAS AND PREJUDICE

Compulsory disqualification of a judicial officer of the State of New York is provided for in Section 14 of the Judiciary Law which was enacted in 1909 and generally amended by Chapter 649 of the statutes of the Laws of the State of New York of 1945.[1/] That section limits the compulsory removal of a judge to cases "in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree". No provision is made for the removal of the judge by reason of personal bias or prejudice. Although the standards of judicial conduct are now contained in Section 33.3(c) of the Rules of the Administrative Board of Judicial Conference of the State of New York, the weight of New York decisional law is still to the effect that a judge does not lose jurisdiction to preside in a case by reason of his personal bias or prejudice. There is no procedural remedy in the State of New York for filing an affidavit of prejudice prior to trial, similar to the procedure prevailing under 28 U.S.C., Section 144, with regard to the federal courts, or as are available in some other states.[2/]

In the very case in which the plaintiff-appellant is a litigant in the state courts, the Appellate Division,

Second Department held that a Writ of Prohibition (Article 78 Proceeding) would not lie to remove a judicial officer by reason of the allegation of his personal bias and prejudice.

However, the standards of compulsory disqualification of a judge havebeen expanded by Section 33.3(c) of the Rules of the Administrative Board of the Judicial Conference of the State of New York,[3/] in conformity with the cannons of Judicial Ethics promulgated by the American Bar Association.[4/] These also found expression in 28 U.S.C., Section 455, as amended on December 5, 1974, Public Law 93-512, Section 1, 88 Stat. 1609.[5/] The plaintiff-appellant herein urged in his Article 78 Proceeding in the Appellate Division, Second Department, that the standards of judicial conduct promulgated in the Rules of the Administrative Board of Judicial Conference required removal of the defendant-appellee herein, but that contention was clearly rejected, and it appears, therefore, that the law of the State of New York provides no remedy for the removal of a biased judge prior to trial.[6/] A litigant's remedy in the New York state courts is thus limited to an appeal from the judgment of the biased judge, and that principle seems to be well-established. As the Appellate Division of the Supreme Court of the State of New York, Second Department, said in Frischling v. Schrank, 24 App.Div. 2d, 462, 463:

> "In our opinion, the court had become so biased at this point that it could not properly evaluate the written evidence and the testimony of the decedent's widow which were thereafter adduced. The defendants' exhibits might have been of material significance in this action but the Judge indicated that they meant nothing to him. 'Where a judge exercises both the functions of court and jury he should be scrupulous to avoid even the appearance of partiality' (People v. Lennon, 206 App.Div. 266, 268). The right to be tried by a Judge who is reasonably free from bias is a part of the fundamental right to a fair trial. In a non-jury action against a decedent's estate, where death has sealed the lips of the promisor (the decedent) and the executors have the duty to resist the payment of moral obligations which do not impose legal liability (cf. Matter of Taylor, 251 N.Y. 257, 264); and where, before the presentation of the plaintiff's evidence has been completed, the Trial Judge's bias against the defendants' case appears to have become overpowering, the interests of justice require a new trial (cf. Whitaker v. McLean, 118 F.2d 596; People v. Lennon, supra). The reversal of the judgment should not be construed as indicating that it is our view that, after a fair trial and on substantially the same evidence, it would be error to grant judgment in favor of the plaintiff".

The question arises, however, whether the right of appeal from the judgment and the consequent reversal thereof, is a sufficient protection of the federally guaranteed right of due process in a fair trial.

We respectfully submit that a litigant should have a right to a fair trial in the first instance, and should not be compelled, by the federal standards of due process, to submit to a trial before a biased and prejudiced judge.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD NOT HAVE ABSTAINED FROM INTERCEDING IN THE STATE COURT ACTION WHERE THE BASIC AND VALUABLE FEDERALLY PROTECTED RIGHT TO A FAIR TRIAL WAS INVOLVED

The District Court dismissed this action at an informal hearing for a temporary stay, and relied for such dismissal on Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.(2d)(705) 92 S.Ct. 2151, referring specifically to the language of Chief Justice Burger's concurring opinion. Mitchum settled the question in the affirmative that a federal court may intervene in a civil case to enjoin a state court proceeding to prevent the deprivation of federally protected rights, but cautioned that restraint should be exercised upon "principles of equity, comity and federalims" when a federal court is "asked to enjoin a state court proceeding".

In Mitchum, a Florida federal court was requested to enjoin a court proceeding for the closing of a book-store, based upon its "nuisance abatement" statute. The District

Court in this action seems to have accepted the language of Chief Justice Burger as an absolute direction not to intercede in the state court action, but seems to have overlooked that the nature of the federally protected right in this action, namely, the right to a fair trial, is much more basic and valuable to the American way of life than the matters involved in Mitchum. To abstain from taking federal jurisdiction on the question of due process involving the right to a fair trial would, we respectfully submit, violate principles of equity, and would repose the protection of those rights solely into the jurisdiction of the state courts, which appears to be quite inadequate.

It is our respectful submission that in matters of that nature, it should be the policy of the federal courts to intercede in a state court proceeding, so as to guarantee to a litigant the very basic right to a fair trial.

We are fully aware of the equities which have to be weighed, but we believe that the preponderance of the federal interests to be protected is in favor of intercession. The judicial policy of abstention of federal courts has been reviewed in the recent case of Vail v. Quinlan (D.C., S.D.N.Y., reported in New York Law Journal January 16, 1976), and we respectfully submit that the rationale which led the three judges of the District Court in Vail to

reject abstention and to take jurisdiction are applicable to this action. The situation at bar is no interference with a criminal proceeding in the state court, and is no interference at all with the action or proceeding in the state court, but seeks to prevent a costly and practically unappealable court proceeding before a biased and prejudiced judge. There are other judges sitting in the Supreme Court of the State of New York, County of Suffolk, who could have heard the accounting in the state action without the bias and prejudice affecting the defendant-appellee herein. The lack of statutory provisions of the State of New York for the removal of a biased judge prior to trial, and the failure of the state courts to entertain an Article 78 Proceeding in the nature of a Writ of Prohibition to remove a biased judge from hearing the case, are such a blatant violation of the standards of a fair trial and due process guaranteed by the federal Constitution, that abstention by the federal courts would be an abdication of the protection of that basic federal right to the state courts.

We respectfully submit that the District Court erred in abstaining from intercession in the state court proceeding.

POINT II

THE RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JUDGE IS PROTECTED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNIT STATES CONSTITUTION

The numerous decisions of the United States Supreme Court have enunciated the principle that a trial before a fair and impartial judge is of constitutional dimensions.[7/] While the majority of cases deal with criminal trials, the Due Process Clause of the Fourteenth Amendment equally applies to the protection of property, and its protection, therefore, extends to civil action as well as criminal trials.

Mr. Justice McKinnon, sitting in the Court of Appeals for the District of Columbia, reviewed the requirement of a trial before an unbiased judge in the recent case of Mitchell v. Siricca, 502 F.2d 375, and said, at page 382:

> "With regard to this due process right, the Supreme Court has said that 'justice must satisfy the appearance of justice'. Ofutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). The Court, moreover, appears to have raised the appearance of bias test to the constitutional level, at least in cases involving a pecuniary interest, however small, on the part of a judge:
>
> > "For in Tumey [v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.749(1927)] the Court held that a decision should be set aside where there is 'the

> slightest pecuniary interest' on the part of the judge and specifically rejected the . . . contention that the compensation involved there was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . .' (I)n the case of courts this is a constitutional principle.

Commonwealth Coatings Corp. v. Continental Casualty Co. 393 U.S. 145, 148, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968)(emphasis in original). And later in the opinion the Court, referring to the Canon of Judicial Ethics on social relations of judges, stated that 'any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias." Id. at 150, 89 S.Ct. at 340.

This circuit also has adopted the appearance of bias test, with specific reference to the prejudgment of issues in administrative agency disqualification cases. In Cinderella Career and Finishing Schools, Inc. v. FTC, 138 U.S. App. D.C. 152, 160, 425 F.2d 583, 591 (1970), we remarked that administrative hearings 'must be attended, not only with every element of fairness, but with the very appearance of complete fairness.' To the same effect is our decision in Texaco, Inc. v. FTC, 118 U.S. App.D.C. 366, 372, 336 F.2d 754, 760(1964),vacated and remanded on other grounds, 381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714(1965). We also have placed the appearance of bias test on a constitutional level for 'the very appearance of complete fairness (is required). Only thus can the tribunal conducting . . . (the) proceeding meet the basic requirement of due process." Amos Treat & Co. v. SEC, 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267(1962)

Clearly, the disqualification for bias should not be based solely on a pecuniary interest, since a litigant is equally deprived of a fair trial where the bias is motivated by reason of hostility or preconceived notions of the merits of the litigant's case.

A group of researchers, writing in 48 Oregon Law Review, Disqualification of Judges, convincingly stated on page 314 that the motivation of the judge's bias or prejudice is of no consequence, as follows:

> "'Prejudice' or 'bias' was equated with a mental attitude, state of mind, or disposition <u>towards a party</u> such as might preclude a mind perrectly open to the rendition of fair and impartial justice. 'Interest' was equated with the proprietary or pecuniary views the judge might entertain regarding the <u>subject matter</u> involved. Interest was grounds for disqualification, prejudice or bias was not. Although relationship and prior participation did not fit happily within the dichotomy, they were, nevertheless, generally accepted grounds for disqualification, presumably because they lent themselves readily to objective assessment.
>
> Insofar as the <u>effect</u> upon judicial impartiality is concerned, there would appear to be little, if any, material difference between the views harbored by the judge towards the subject matter, and his feelings towards the parties. A judge may be even less inclined to yield to his selfish proprietary or pecuniary interests than to his pent-up animosity".

Pecuniary interests in the outcome of a litigation by a judge, or his "pent-up animosity" towards one of the litigants (or his attorney), is equally destructive of a fair trial, and no distinction should be made of the motivation of a judge in protecting the right to an impartial trial. The differentiation of these two situations would be artificial and insufficient to call for federal intervention in one situation and not in the other. Clearly, experience tells us that bias is not necessarily based on a pecuniary interest in the outcome of a litigation alone. In the case at bar, the animosity of the defendant-appellee towards the attorney for the plaintiff-appellant may be much stronger than some remote small pecuniary interest. It is alleged in the complaint and the affidavit thereto annexed that the attorney for plaintiff-appellant had filed a complaint against the defendant-appellee herein with the Temporary State Commission on Judicial Conduct after he had rendered his decision upon which the Interim Order and Decree of the defendant-appellee was entered (the last judgment of defendant-appellee, reversed on appeal), and it is hardly possible that the defendant-appellee was not, and is not, emotionally affected by that complaint.

The Court of Appeals of the State of Michigan considered a situation of that type in Auto Workers Flint Federal Credit Union v. Kogler, 32 Mich. App. 257, 188 N.W. (2d) 184. There, a judge was removed from hearing the case on the very ground that he was prejudiced against the attorneys for a party to the litigation by reason of the fact that they had filed a grievance complaint against him.

POINT III

THE RIGHT OF APPEAL FROM A JUDGMENT BY A BIASED JUDGE IS NOT AN ADEQUATE SAFEGUARD OF THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL

We submit that the litigant is entitled to a fair trial in the first instance, and should not be required to be subjected to a trial which would be reversed on appeal for the sole reason of the judge's bias or prejudice.

As was said by the Supreme Court in Berger v. United States, 225 U.S. 22, at p. 36:

> The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." (Emphasis supplied)

It seems to be the approach of the courts of the State of New York that the constitutional right of a litigant to a fair trial is safeguarded by his right to appeal from an adverse judgment.

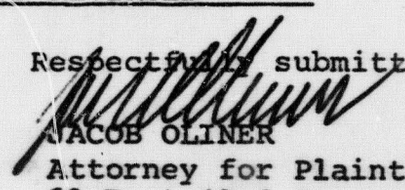
We respectfully submit that that approach disregards the realities of litigation; that the reversal of a judgment is beset with a great number of difficulties, not the least of which is the reading of a voluminous record by the Appellate Court. If there is added thereto financial inability of financing a voluminous record and the appellate procedure, the right of appeal becomes academic and non-existent in reality. Clearly, the theoretical right of appeal is not an adequate protection to a fair trial under the Due Process and Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.

Federal [illegible]ercession is required to protect the litigant in the [illegible]ourts of the State of New York against the hazzards of an unfair trial.

CONCLUSION

THE JUDGMENT OF DISMISSAL HEREIN APPEALED SHOULD BE REVERSED

Respectfully submitted,



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FOOTNOTES

1/ Section 14, Judiciary Law of the State of New York reads:

> "Disqualification of judge by reason of interest or consanguinity.
>
> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge."

2/ For a tabulation of procedural provisions in the several states, see 48 Oregon Law Review, Disqualification of Judges, page 347.

3/ Section 33.3(c) of the Rules of the Administrative Board of the Judicial Conference of the State of New York, reads in part:

"(c) Disqualification

(1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(i) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;"

4/ Cf: Wise, Legal Ethics, November 1975 - Supplement on Judicial Ethics, page 56.

5/ 28 U.S.C. Section 455 as amended, reads in part:

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

FOOTNOTES (Cont'd)

6/ Matter of Rothwein (1943) 291 N.Y. 116;
Fitzgerald v. Wells (1959) 9 App.Div. 2d 812;
Weiner v. Savarese (1951) 109 N.Y.S. 2d 14;
People v. Owen (1954) 205 Misc., 1452;
People v. Capuno, 68 Misc.2d 481.

7/ Tumey v. Ohio (1927) 273 U.S. 510;
In re Murchison (1955), 349 U.S. 133;
Sheppard v. Maxwell, (1966) 384 U.S. 333;
Mayberry v. Pennsylvania (1970) 400 U.S. 453;
Johnson v. Mississippi (1971) 403 U.S. 212.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK S.S.:

S. David Oliner being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at Dobbs Ferry, New York

On April 13, 1976 I served the within Plaintiff Appellant's Brief upon Hon. Louis J. Lefkowitz
Attorney General of the
State of New York
the attorney(s) for Defendant- in this
Appelle
action, at Two World Trade Center, N.Y., N.Y.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

S. David Oliner

Type or Print Name Below Signature
S. David Oliner

Sworn to before me
this 13th day of April, 1976.

JACOB OLINER
Notary Public, State of New York
No. 60-[illegible], Qual. Westchester County
Commission expires March 30, 1977